INDEX

CITATIONS

109750—38——1

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 274

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE SANDS MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 25–42) are reported in 1 N. L. R. B. 546. The opinion of the Circuit Court of Appeals (R. 607–614) is reported in 96 F. (2d) 721.

JURISDICTION

The judgment of the court below (R. 614) was entered May 13, 1938. The petition for a writ of certiorari was filed on August 13, 1938, and was granted on October 10, 1938. The jurisdiction of this Court rests on Section 240 (a) of the Judicial

Code as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the duty of respondent under Section 8 (5) of the National Labor Relations Act to bargain collectively with its employees obligated respondent, after prior negotiations had resulted at most in a temporary impasse, to resume negotiations when circumstances had so changed that a settlement of the dispute might reasonably have been expected.

2. Whether there was evidence to support the finding of the National Labor Relations Board that certain employees of the respondent were refused reinstatement because they were members of a particular labor organization and had engaged in concerted activities for the purpose of collective bargaining.

3. Whether respondent violated Section 8 (3) of the National Labor Relations Act in offering to reinstate certain employees only on condition that they join a particular labor organization, although respondent had no closed-shop agreement with that labor organization.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Supp. III, Title 29, Sec. 151, *et seq.*) are set forth in the Appendix, pp. 53–54, *infra*.

STATEMENT

Upon a charge (R. 6) duly filed by the Mechanics Educational Society of America (hereinafter referred to as the M. E. S. A.), a labor organization, the National Labor Relations Board, on November 12, 1935, pursuant to Section 10 (b) of the National Labor Relations Act, issued a complaint and notice of hearing, which were duly served upon respondent (R. 7–11). In addition to jurisdictional allegations, the complaint alleged, in substance, that respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1), (3), and (5) of the Act (R. 7–10). On November 20, 1935, an answer was filed by respondent, in which it denied the commission of the unfair labor practices (R. 11–24). A hearing was held from November 25 through November 30, 1935, before a Trial Examiner duly designated by the Board (R. 24). Thereafter the Trial Examiner filed an intermediate report (R. 42–62) containing his findings and recommendations, to which exceptions were filed both by respondent and the M. E. S. A. (R. 27, 63–99). Respondent argued the case orally before the Board, and filed a brief in support of its position (R. 27). On April 17, 1936, the Board issued its decision, setting forth its findings of fact, conclusions of law, and order (R. 25–42). The facts, as disclosed by the Board's findings, fully supported by evidence, may be summarized as follows:

Respondent is an Ohio corporation, with its principal office and place of business in Cleveland, Ohio. It is engaged in the manufacture, sale, and distribution of gas and kerosene hot water heaters. During the period from January 1 to October 1, 1935, its purchases of raw materials totalled $181,828.51, of which the purchases from within the State of Ohio totalled $106,616.31. During approximately the same period the value of its shipments of finished products and parts totalled $318,117.08, of which shipments outside Ohio amounted to $284,025.91 (R. 28). There is no question raised as to the jurisdiction of the Board.[1]

Early in 1934 practically all of respondent's production and maintenance employees, which the Board found to constitute a unit appropriate for collective bargaining (R. 29), became members of the M. E. S. A. (R. 28–29; 122–123, 128). In April 1934 these members of the M. E. S. A. designated a committee (R. 29; 597), which, after negotiations with respondent, entered into a collective agreement with it (R. 29; 122, 127–128, 598–599). The agreement was to run for 60 days, but by mutual consent the parties continued to operate under it until May 1935, when negotiations for a new agreement commenced (R. 29; 124–125, 411). After two strikes occurring during the course of these negotiations

[1] Respondent's contention that the Act was constitutionally inapplicable to its business and the employees involved was abandoned by it prior to the argument in the court below.

(R. 29–30; 137–142, 147, 257–264, 358–361, 414–416) the M. E. S. A. committee and respondent entered into a contract dated June 15, 1935 (R. 30; 600). This contract contained, *inter alia,* the following provisions (R. 31; 600):

> (5) That when employees are laid off, seniority rights shall rule, and by departments.
>
> (6) That when one department is shut down, men from this department will not be transferred or work in other departments until all old men only within that department, who were laid off, have been called back.
>
> (7) That all new employees be laid off before any old employees, in order to guarantee if possible at least one week's full time before the working week is reduced to three days.[2]

On June 15, 1935, and at all times thereafter, the M. E. S. A. represented a majority of respondent's employees in the appropriate unit (R. 29, 30; 232, 234–235).

Upon the full resumption of operations on June 17, 1935, respondent added about 30 "new" men

[2] Throughout the record, the Board's decision, the opinion of the court below, and this brief, the term "old" employees refers to the men employed by respondent prior to a temporary expansion of its personnel in the fall of 1934 to fill an order placed by the United States Government. "New" employees were those hired to work on that order as well as those hired thereafter (R. 29; 244, 605, 610n). The "old" men totalled 34, of whom 32 were M. E. S. A. members (R. 122–123, 128, 597).

to its pay roll to enable it to fill the orders which had accumulated during the strikes (R. 30; 234, 421–422). As soon as the orders were filled, however, respondent proceeded to reduce its force so that by the end of July all of the "new" men were laid off (R. 30; 220–222, 516–517). In fact, from the middle of July on operations were being curtailed, and by August 2 the plant was being operated by "old" men only on a schedule of 3 days a week (R. 30; 428–429, 554–555).

At about this time respondent wished to increase the working force in the machine shop, and to close down the other departments (R. 31; 470–471, 517). A disagreement arose between respondent and the M. E. S. A. as to whether, under the June 15 contract, respondent might increase its working force in the machine shop by the recall of "new" men who had had machine shop experience, or whether, as the M. E. S. A. insisted, respondent should transfer "old" employees to the machine shop from the other departments which were to be shut down (R. 31, 34–35; 371–372, 375, 470–471, 555–556). Conferences on this subject were held and continued until August 19, 1935, but no resolution of the disagreement was reached (R. 31; 286, 371–372). On August 19, Garry Sands, respondent's secretary-treasurer, asked the M. E. S. A. committee to consult the men to ascertain whether they preferred that the entire plant be temporarily shut down rather than that the machine shop force be increased with "new" men while "old" men were idle (R. 31-

32; 375–377, 572). The men preferred the former alternative, and on August 21, respondent posted a notice that the plant would close that night "until further notice" (R. 32; 14, 351). The impelling motive for respondent's desire to use additional "new" men in the machine shop, rather than to transfer "old" employees to that department was the fact that wage rates were determined wholly by length of service in the plant, and the "new" men would accordingly receive a lower wage than the "old" men (R. 36; 372–373, 375–376, 572).

On August 26 or 27, while the plant was still closed, respondent approached the International Association of Machinists, another labor organization (hereinafter referred to as the Machinists) (R. 22; 450). Notwithstanding the fact that a general wage reduction was neither proposed by respondent nor discussed at the conference with the M. E. S. A. during July and August, respondent immediately negotiated a contract with the Machinists, effective September 3, at a lower scale of wages (R. 32, 37–38; 450–452, 546–547, 553–554).

The plant was reopened on September 3 (R. 32, 22). Only such "new" men as were members of the Machinists [3] were notified to report for work, and further men were obtained through the Ma-

[3] Of the approximately 35 "new" men taken on by respondent in 1934 to work on the government order (footnote 2, p. 5, *supra*) all but three or four joined the M. E. S. A. (R. 29; 18, 130, 136). Of the "new" men employed for the first time after June 17, 1935, to work on the orders

chinists and from the county relief rolls (R. 32; 22, 452–453). Of the "old" employees who were members of the M. E. S. A. only four were notified to return; two of them were offered employment on condition that they join the Machinists, and Garry Sands attempted to persuade at least three of them to take wage cuts in return for guarantees of steady work (R. 32–33; 329–330, 340–341, 343–346, 353–356, 390–391, 445–448, 522–528). Others of the "old" men who applied for their positions after the plant reopened were told that their places had been taken (R. 33; 22, 528–529, 535). Although Garry Sands stated that the "old" employees would not be recalled to work because their hourly rates of pay were too high (R. 33; 355–356), the fact is undisputed that a considerable number of "new" men belonged to the M. E. S. A., none of whom were asked to return (R. 32; 22, 198–199, 452–453). In all, respondent failed to reinstate 47 members of the M. E. S. A., made up of both "old" and "new" employees, upon the reopening of its plant on September 3, 1935 (R. 39; 558–559).

On the day following the reopening of the plant, the M. E. S. A. protested the lock-out of its members, and asked Garry Sands to meet with the M. E. S. A. committee, which he refused to do (R.

---

accumulated during the two strikes preceding the execution of the June 15 contract (pp. 5–6, *supra*), some had joined the M. E. S. A. and some had joined the Machinists (R. 38; 235–236, 244).

33–34; 134–135, 529–530, 569–570). On September 10 respondent, because of its apprehension that the M. E. S. A. might file charges under the Act, procured a cancellation of its week-old contract with the Machinists, so that no issue is here presented as to the validity of that contract (R. 34; 531, 544–546, 602). Respondent continued, however, to pay the lower wage scale and otherwise observe the terms of the contract (R. 34; 544–546).

The Board found, after a review of the evidence which is set out at pp. 41–46, *infra*, that the members of the M. E. S. A. were locked out, discharged, and refused employment because of their M. E. S. A. membership (R. 38–39), and that by this discrimination, and by the imposing of membership in the Machinists upon some of them as a condition of reinstatement, respondent had violated subdivisions (1) and (3) of the Act (R. 40–41). The Board also found that respondent had failed to bargain with the M. E. S. A. concerning the contract dispute, the failure to abide by the understanding reached on August 21, and the new wage issue (R. 38), in violation of subdivisions (1) and (5) of the Act (R. 40–41). The order of the Board (R. 41–42) required respondent to cease and desist from such unfair labor practices and, as affirmative action necessary to effectuate the policies of the Act, required respondent to reinstate, with back pay, the members of the M. E. S. A. who had been locked out, and to bargain collectively with the M. E. S. A. upon request. On June 24, 1937, the

Board, pursuant to Section 10 (e) of the Act, filed in the court below its petition for enforcement of its order. Thereafter respondent filed its cross-petition to review and set aside the order. On May 13, 1938, the court dismissed the Board's petition to enforce, and set the order aside (R. 697). On October 10, 1938, this Court granted a writ of certiorari (R. 615).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In not holding that respondent violated the National Labor Relations Act by failing to bargain collectively with the duly authorized representative of its employees at a time when changed circumstances indicated a reasonable probability that a prior temporary impasse could be resolved through further negotiation.

2. In not holding that the Board's finding that respondent had, following a temporary lay-off of its employees, denied reinstatement to employees by reason of their affiliation with a particular labor organization, was supported by evidence and was therefore conclusive under Section 10 (e) of the Act.

3. In not holding that respondent violated the National Labor Relations Act by offering reinstatement to employees, following a temporary lay-off, upon condition that they join a labor organization which did not have a closed-shop contract with the employer.

4. In not holding that employees who cease work by reason of a temporary lay-off following a temporary impasse in negotiations between their representatives and their employer remain "employees" for the purposes of the National Labor Relations Act.

5. In denying enforcement to the Board's order.

SUMMARY OF ARGUMENT

I

A. The National Labor Relations Board found, upon compelling evidence, that respondent had violated Section 8 (5) of the Act by failing to bargain collectively with the M. E. S. A. committee, the duly designated representatives of the majority of its employees. The finding was clearly correct. For several weeks respondent and the committee had discussed the problem of seniority raised by respondent's decision to close down all but the machine shop of its plant and to increase the force in that department. Respondent contended that under the June 15 contract it could employ "new" men in the machine shop; the committee contended that the additional men should be selected from qualified "old" employees from other departments of the plant. On August 21, 1935, at respondent's suggestion, the whole plant was temporarily closed to allow orders to accumulate until all departments of the plant could reopen at once and the seniority problem be at least temporarily eliminated.

Since August 21 respondent has failed to bargain with the committee, although on at least three issues it was under a plain obligation to do so. The construction of the contract had been discussed, but no one believed that a permanent impasse had been reached, nor was there any evidence that if and when the issue again arose it could not have been solved by further conferences. Moreover, respondent created a new issue upon which it was obligated to bargain when its plant reopened on September 3 without the M. E. S. A. men contrary to the understanding reached by the parties on August 21. Finally, respondent brought sharply to the foreground after August 21 an issue underlying the whole dispute from its viewpoint—the wage rates of the "old" employees. The controversy had not been discussed from that approach, and not until it had been explored by the committee could it properly be said that further negotiations would be fruitless. That the two latter issues arose subsequent to the temporary cessation of negotiations is of no consequence. *Jeffery-De Witt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731.

B. Respondent's failure to bargain is not excused either on the ground that the committee had misinterpreted the seniority provisions of the contract of June 15 or upon the ground that the M. E.

S. A. employees were discharged before the obligation to bargain arose. Actually, the committee's interpretation of the contract was probably correct, but, irrespective of that, the interpretation of the contract is irrelevant to respondent's obligation. Obviously it could have no bearing upon the new issues raised after August 21. And on the issue of the construction of the contract the obligation imposed by Section 8 (5) is not conditioned upon a finding that existing conditions be left undisturbed. The purpose of the Act is to encourage the procedure of collective bargaining for the settlement of all differences. Finally, since no actual breach of the contract had occurred, respondent was no more justified in refusing to deal with the committee after August 21 than it would have been when the issue was first raised.

Nor did respondent discharge the M. E. S. A. employees before its obligation to bargain arose. The evidence shows clearly that the M. E. S. A. members remained employees at least until September 4, when a specific request for a conference was made on their behalf. Moreover, respondent had violated Section 8 (5) of the Act by negotiating an agreement with a union not the representative of the majority of its employees on August 26 and 27, and at that time there can be no doubt that the M. E. S. A. men had not been discharged. In any event, if, as the Board found, the M. E. S. A. men were

discharged because of their membership in that union, under Section 2 (3) they remained employees for purposes of the Act.

II

The Board also found, upon a full review of the evidence, that the M. E. S. A. employees had been discharged because of their union membership and activity. The court below held that there was no evidence to support this finding. We submit that the finding is amply supported. Respondent does not deny that it peremptorily eliminated all of the M. E. S. A. employees. That fact alone, taken in conjunction with the complete breakdown of respondent's attempts to explain the mass discharge, leads irresistibly to the conclusion reached by the Board. Moreover, the record reveals that respondent had become hostile to the M. E. S. A. following two strikes which had occurred in May and June, 1935. Various of respondent's officers and supervisors made remarks plainly indicating hostility to the M. E. S. A. Finally, respondent's explanations of the mass discharge fail completely. Its contention that the M. E. S. A. men were discharged because they had breached the contract is refuted by its offer to re-employ four of the men who had been "guilty" of "contract breaking." Its contention that the men were discharged because their wages were too high is refuted by the fact that it did not offer to re-employ even the low-priced M. E. S. A. men. Its contention that none of the M. E. S. A.

men applied for reemployment is plainly refuted by its notification on August 21 that the men would be given "further notice" when the plant reopened, and by the fact that in the past it had always notified the men when the plant reopened.

III

The Board found that offers of reinstatement to two of the M. E. S. A. men were conditioned upon their joining the Machinists. The court below accepted the finding, but on wholly irrelevant grounds refused to enforce the portions of the Board's order directed to that violation. The offers were plain violations of Section 8 (3) of the Act.

ARGUMENT

I

THE BOARD CORRECTLY HELD THAT RESPONDENT HAD VIOLATED SECTION 8 (5) OF THE ACT

The conclusion of the National Labor Relations Board that respondent had been guilty of a violation of Section 8 (5) of the Act in failing to bargain collectively with the representatives of the majority of its employees was based upon a series of findings: that at the time of the shut-down of respondent's plant on August 21, 1935, there was nothing to indicate that a permanent impasse in the negotiations had been reached (R. 37); that thereafter conditions changed and new issues arose, so that there appeared a reasonable likelihood that

further negotiations would resolve the dispute (R. 37–38); that nevertheless respondent abruptly terminated its negotiations with the M. E. S. A. committee and negotiated a contract with another labor organization (R. 32, 37); and that respondent refused a request on behalf of the M. E. S. A. committee for a meeting with it (R. 33–34, 38) although that committee was then the exclusive representative of respondent's employees (R. 29, 30, 36–37). The court below, apparently basing its decision partly on a refusal to accept the findings of the Board that further conferences might be expected to resolve the dispute and partly on its holding that the employees had breached the contract of June 15, 1935, decided that respondent had not been guilty of a violation of Section 8 (5). It therefore refused to enforce the portion of the Board's order based upon that violation.

We submit that the court below was in error in each of its premises and in its conclusion. In Part A, *infra,* we will show that there is adequate evidence to support the finding of the Board that respondent's obligation to bargain had not been discharged. In Part B, *infra,* we will show that, no matter how it be viewed, the contract of June 15, 1935, is irrelevant to the duties of respondent under Section 8 (5).

A. RESPONDENT'S OBLIGATION TO BARGAIN COLLECTIVELY WITH THE M. E. S. A. COMMITTEE HAD NOT BEEN SATISFIED BY THE CONFERENCES PRIOR TO AUGUST 21

Under Section 8 (5) of the National Labor Relations Act, *infra*, p. 54, an employer is obligated to "bargain collectively with the representatives of his employees * * *" The statute does not define the extent of the obligation; indeed, no precise statement is possible. The policy of Congress, however, not only in this but also in other statutes, is to make of collective bargaining an effective "instrument of peace" in the settlement of labor disputes, *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 570, by imposing upon employers an obligation to make a "reasonable effort to compose differences." *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 548. With the sole qualification that no agreement is compelled (*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45) there can be no doubt that the duty to bargain collectively imposed by Section 8 (5) is commensurate with the opportunities for a successful termination of the dispute. *Jeffery-De Witt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731; *National Labor Relations Board* v. *Biles Coleman Lumber Co.*, 98 F. (2d) 18 (C. C. A. 9th); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, No. 907, May

23, 1938; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, No. 970, May 23, 1938.

In the present case the Board, upon a full review of the evidence, found as a fact that upon certain issues the respondent failed in its obligation to bargain collectively with the M. E. S. A. committee. On the evidence in the record it is clear not only that the Board's finding was supported by evidence but also that no other conclusion was possible.

A brief statement of the events preceding the temporary shutdown on August 21, 1935, will clarify the subsequent discussion. During June and July the orders which had accumulated during the strikes in May and June had been largely filled. During July respondent had reduced its working force by laying off all the "new" men who had been taken on because of the accumulated business (R. 30; 220–222, 516–517). By August 2 respondent had put the remaining "old" men on a schedule of three days a week (R. 30; 428–429, 554–555). Some departments were closed down completely (R. 30–31; 365–366, 514, 574).

At about this time respondent decided that for business reasons the whole plant should be temporarily shut down, except that the machine shop should be run with an increased force in order to prepare stock in anticipation of a reopening (R. 31; 279–280, 375, 470, 517). The seniority prob-

lem raised by that decision was the subject of numerous conferences between the M. E. S. A. committee and respondent's officers (R. 31; 286, 371–372). The former desired that the additional men whom respondent proposed to add to the machine shop force should be selected from qualified "old" men regularly employed in other departments which were to be closed down (R. 31; 289–290, 367–368, 372–373, 385, 573–582). Respondent insisted that the additional men be recruited from "new" men formerly employed in the machine shop, but who had been laid off previously (R. 31; 417–418, 427, 515, 517). The discussions had on this question, and the arguments advanced by each side, were limited to the inquiry as to which position constituted the proper construction of the agreement which had been signed by the M. E. S. A. committee and respondent on June 15, 1935 (R. 600–602).

Finally, at a meeting on August 19, Garry Sands, respondent's secretary-treasurer, gave the committee alternatives which he asked them to submit to the men: either a consent to the operation of the machine shop with "new" men and the temporary shut-down of the other departments—i. e., acquiescence in respondent's contentions, or a temporary complete shutdown of the whole plant (R. 31–32).[4]

[4] The Board found that Garry Sands proposed the alternatives of laying off the "old" employees and increased operation of the machine shop with "new" employees or a temporary shut-down of the entire plant (R. 31–32). That finding, which is based upon the testimony of members of

The committee did as requested, and found that the men preferred the latter course. At a meeting on August 21 they told respondent of the men's decision. Consequently, on that day the management posted a notice on the time clock as follows (R. 32, 351):

> The factory will shut down Wednesday night, August 21st, until further notice.[5]

Since that time, respondent has not met or bargained with the M. E. S. A. committee—a course of conduct approved by the court below (R. 613). We submit, on the contrary, that on at least three separate matters respondent was plainly obligated to bargain further.

1. The agreement reached on August 21, 1935, that the plant shut down "until further notice" (R. 351) was recognized by both parties as a compromise by which the dispute as to the shifting of "old" men to the machine shop could be at least temporarily resolved, and perhaps permanently eliminated. The record is clear that both the committee and respondent's officers recognized that if the plant was temporarily closed, enough orders would accumulate so that in a few weeks the plant

---

the M. E. S. A. committee (R. 375–377, 572) was not disturbed by the court below (R. 609). Respondent's witnesses agreed that these were the alternatives, but they stated that the proposal was first advanced by the committee (R. 431-433, 519–520, 555–560).

[5] The record at p. 32 erroneously states that date as August *31*. It is stated correctly in the stipulation entered into by the parties (R. 351).

could resume full operations with the "old" men in their regular departments. No one believed that a permanent impasse had been reached.

Pansky, a member of the M. E. S. A. committee, testified that at the conference on August 19 Garry Sands stated that if respondent's suggestions as to the addition of "new" men in the machine shop were not acceptable to the men "maybe we will shut down the factory for a week or two until some work comes, some orders comes in" (R. 376–377). This is corroborated by Jindra, another committeeman, who quoted Sands as stating that the plant would have to "shut up for two weeks" (R. 572). Sands denied saying anything about closing the plant for a week or two, but testified that he directed the committee to consult the men "and see if they have any suggestions to offer and what we can do about it," and that the committee returned on August 21 and asked that the plant be shut down "until you get busy so as to take back all the old men" (R. 519–520, 553, 556). The notice itself, posted at Sands' direction, stated that the closing was simply "until further notice" (R. 32; 351, 620).

Consequently, the statement of the court below that "Respondent was not obligated to prolong the impasse" (R. 613) is based upon a serious misapprehension of the facts. Actually, respondent and the committee had agreed to a device whereby further conferences on the issue upon which they were in conflict could be postponed, at least, and, if busi-

ness improved so that the whole plant could be kept running, could be completely eliminated. Nothing in the situation as it existed on August 21 indicated that respondent would not bargain further on that issue if and when it arose again. The issue had simply been avoided by the device of the temporary shut-down. The abrupt decision of respondent not to bargain further, reached and acted upon without even a notice to the committee with which it had been bargaining, is simply a unilateral termination of negotiations at a point at which there was every reason to believe that the passage of time would make the whole issue moot. Certainly Section 8 (5) cannot mean that because it took many conferences, a direct clash of opinion, and a closing of the plant, in order to arrive at a solution, the fact of the solution can for that reason be ignored by one of the parties. In the opinion of the court, the Board "gives overemphasis to the events which occurred after August 21, 1935" (R. 613). Actually, we submit that in view of the understanding which was arrived at on August 21, the numerous conferences and other events prior to that date, except in so far as they explain the issues, are almost completely irrelevant.

2. But aside from this, and even on the assumption that an impasse had been reached on August 21 with respect to the rights of the parties under the contract of June 15, the understanding arrived at on that day, and the events which occurred later, brought forward new issues apart from those aris-

ing under the contract as to which respondent was under obligation to negotiate. Whatever else was intended by the understanding of August 21, it cannot be disputed that the closing of the plant on that date was to be for only a temporary period until sufficient orders accumulated to warrant taking back all the "old" men in their own departments. As already pointed out (*supra*, pp. 20–21), both parties so understood the situation when the plant was shut down. The failure of respondent to abide by this understanding, by the reopening of its plant without the M. E. S. A. men, therefore, created a new issue more immediate and more vital to the employment relation of the parties than anything that had gone before.

Indeed, it would be no answer to suggest that respondent had not violated any agreement of August 21—that there was no agreement, or that if one did exist, it was not that which is here suggested. Irrespective of either of those considerations, it is plain from the testimony of Garry Sands (R. 556) that respondent knew that the committee understood the shutdown as a solution of the problem, and as a plan whereby they would all eventually come back to work. Under those circumstances, it seems plain that respondent could not, consistently with Section 8 (5) of the Act, abruptly and without conference, take final action inconsistent with the known understanding of the men. Respondent, of course, might have adhered

MICROC

TRADE M

MICROC
EDITION

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MIC
901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 200

24

to its original decision after collective bargaining; but by the plain requirements of the Act it could not make that decision without collective bargaining on this new issue which it had raised.

3. Finally, immediately after August 21 respondent itself brought sharply to the foreground an issue upon which, although it was basic to the whole dispute, there had not theretofore been any bargaining. Prior to August 21 the conferences had been directed exclusively to an attempt to resolve conflicting interpretations of the June 15 contract in so far as it did or did not limit respondent's right to hire "new" men in the machine shop without regard to the seniority status of "old" men made idle by shut-downs in other departments (R. 286, 376, 518–519). As Garry Sands stated (R. 518) "every meeting was concentrated on" the matter of departmental operation. In fact, however, as the Board found (R. 36), the real and fundamental objective of respondent's insistence upon the right to hire "new" men was to secure a reduction in wage costs.[6] Wage rates

[6] The court below ignored this finding and accepted respondent's contention that its objection to the transfer of "old" men was based on the inefficiency of employees so transferred (R. 611–612). The finding of the Board was, however, amply supported. Employees had been transferred from one department to another over a period of years (R. 383–384, 479, 489, 495, 515, 519, 562–563, 568, 581), but respondent failed to introduce any testimony showing that any particular man proved inefficient in the department to which he was transferred. No complaint because of in-

were determined wholly by length of service; hence "new" men would receive a lower wage than that which respondent would be obliged to pay "old" employees transferred from other departments (R. 372–373, 375–376, 572). Indeed, the testimony of respondent's officials makes it clear that reduction in wage rates, concomitantly effecting a reduction of operating losses, was the underlying source of the whole dispute (R. 430–432, 470–471, 522–523, 572).

Neither party, however, attempted to resolve the dispute on this basis. Garry Sands testified that at the conference on August 19, 1935, "wage rates were not discussed" (R. 554). This possible basis for settlement was obscured throughout the negotiations had up to August 21, on the one hand, by the claim that the committee's stand was in breach of the contract (R. 519), and on the other hand by the contention that the transfer of men from one department to the other was inefficient (R. 412, 432, 520–521).[7] The wage issue clearly was more funda-

---

fficiency was ever registered against any of the men when hey were transferred to work in other departments, including the machine shop (R. 185, 319–321, 327, 347, 385, 568). n some cases the old men when transferred were more efficient than the new (R. 561, 563). Indeed, at a meeting of he employees in March 1935 Garry Sands plainly indicated hat it was not difficult to adapt men to do satisfactory machine shop work by pointing out the speed and ease with which he had broken in many new emp' ees to the work n the machine shop in 1934 (R. 552).

[7] See footnote 6, *supra*.

mental than either. Not until it had been explored with the committee could it properly be said that further negotiations would be fruitless.

But it was not until after August 21 that that issue for the first time came to the front. Shortly after that date Garry Sands, in a conversation with Farrell, one of the "old" employees, explained that the shut-down of August 21 was an economy move, and voiced to Farrell the belief that the men "might be better off if they worked for a little less wages and more steady employment" (R. 315–316, 318–320, 442–443, 522–523). This proposition was specifically offered to at least three "old" men as a condition of employment (R. 329–330, 343–344, 354, 591), as respondent's witnesses themselves admitted (R. 432–433, 445–447, 449–450, 525). That it was not offered to more of the M. E. S. A. men does not weaken the effect of the offers as corroborative of the evidence, furnished by the remarks to Farrell, that it was not until after the shut-down that the real issue came to light.

With the issue out in the open, of course, a situation was presented in which negotiations might proceed. Indeed, Farrell himself pointed out to Garry Sands that "if he did talk to the committee they would agree to take a cut" (R. 316).

It cannot be urged that the new issues presented by the agreement of August 21, and by the suggestion of a modification of wage rates, were *subsequent* to the suspension of negotiations on

August 21 and therefore irrelevant. The obligation to bargain collectively clearly extends to matters which come to light or are created subsequent to a temporary suspension of negotiations. *Jeffery-De Witt Insulator Co.* v. *National Labor Relations Board,* 91 F. (2d) 134 (C. C. A. 4th), is directly in point. There almost a month after negotiations had reached an impasse, two conciliators who had been instrumental in settling previous strikes offered to mediate. The company refused to reopen the negotiations. The Board found the refusal to be a violation of Section 8 (5), and its order was enforced by the Circuit Court of Appeals. The court stated (91 F. (2d) at p. 139):

> The company's second contention is that it was not guilty of an unfair labor practice in refusing to bargain with the union on and after July 15th, for the reason that efforts to bargain with it prior to June 20th had resulted in failure and an impasse in the negotiations had been reached. The answer to this is that nearly a month of "cooling time" had elapsed since the negotiations of June 15th to 20th, the status of the controversy had undergone considerable change as a result of the operation of the plant, the striking employees after nearly a month of idleness were doubtless willing to make concessions to compromise the matters in difference, and conciliators had arrived upon the scene for the purpose of trying to secure an adjustment.

We submit, therefore, that the record compels the conclusion of the Board that respondent's obligation under Section 8 (5) to bargain collectively with the M. E. S. A. committee had not been carried out. The dispute upon which numerous conferences had been held—the proper interpretation of the contract of June 15—had been resolved by the temporary shut-down. The failure of respondent to abide by the agreement of August 21 created a new issue which could not be resolved by the unilateral, unannounced action of respondent. The wage issue, which was fundamental, had not been explored at all, and had come definitely to the front as a new basis of solution.

In any event, there can be no possible doubt that there was adequate evidence to support the finding of the Board that upon several issues further collective bargaining might reasonably be expected to result in an amicable settlement of the questions at issue between the respondent and its M. E. S. A. employees. The matter is plainly one of fact (*Jeffery-De Witt Insulator Co.* v. *National Labor Relations Board,* 91 F. (2d) 134, 139–140 (C. C. A. 4th), certiorari denied, 302 U. S. 731), upon which the finding of the Board, if supported by evidence, is conclusive. Section 10 (e); *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board,* 301 U. S. 142, 147; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261, 270, 271.

B. THE CONTRACT OF JUNE 15, 1935, IS IRRELEVANT TO RESPONDENT'S OBLIGATION UNDER SECTION 8 (5)

The holding of the court below that respondent had not violated Section 8 (5) of the Act is also based upon the ground that the terms of the contract of June 15, 1935, limited the obligation to bargain collectively which would otherwise have existed. Although the rationale of the decision is by no means clear, there seems to be a combination of two arguments: (1) that if respondent's interpretation of the contract were correct, and that of the committee erroneous, respondent was under no obligation to bargain further on that issue (R. 613), and (2) that if the employees had violated the contract, respondent could, and did, abrogate the contract, sever the employer-employee relationship, and thereby relieve itself of any obligation whatsoever to bargain with the M. E. S. A. committee (R. 610). Both arguments are, we submit, without merit.

1. The correct interpretation of the contract of June 15 is irrelevant to respondent's failure to bargain collectively

The court below discussed at some length the proper meaning of the contract of June 15, 1935 (R. 611–613), and finally resolved the question of interpretation in favor of respondent. We believe, as we have indicated in the footnote,[8] that the con-

[8] The contract of June 15 provided, *inter alia* (R. 600):

(5) That when employees are laid off seniority rights shall rule, and by departments.

(6) That when one department is shut down men from this department will not be transferred on work

struction adopted by the court was incorrect. At least, there is much to be said on both sides of that question—certainly enough to warrant the finding by the Board that there was an "honest difference

---

in other departments until all old men only within that department who were laid off have been called back.

(7) That all new employees be laid off before any old employees in order to guarantee, if possible, at least one week's full time before the working week is reduced to three days.

Respondent claimed that under these provisions seniority rights applied only by departments, basing its position chiefly upon the fact that in paragraph (5) it had caused to be added the words "and by departments," and in paragraph (6) the word "only" to the form of contract first submitted by the M. E. S. A. (R. 160, 277, 289, 600, 603). But the addition of these words did not change the substance of the agreement from that of the 1934 contract (R. 598), under which "old" men were transferred from one department to another before any "new" men were taken on (R. 383–384, 495, 515, 519, 568, 581). But even aside from this fact, paragraph (7), it is to be noted, is not restricted to departments, and, in providing that "*all* new employees be laid off before *any* old employees" it discloses an intention that "old" men be given preference over "new" generally and without regard to departmental seniority. As late as July 30, 1935, respondent adopted that construction of paragraph (7) in laying off all "new" employees, including those in the machine shop. (R. 580). Moreover, paragraphs (5) and (7) deal only with seniority as respects the *lay-off* of men, not in *hiring*, the problem raised by respondent's desire to *increase* the machine shop force. Under the most likely construction, therefore, these provisions did not cover the matter in dispute at all. Paragraph (6), which does apply to hiring, makes it plain that the contract was not intended to abolish the transfer system. That paragraph clearly provides for the continuance of inter-departmental transfers, provided only that no transfer be made to the position of any "old" men then laid off from the department to which the transfer was contemplated.

of opinion" on the correct meaning of the contract (R. 36). We also believe, however, that that question has been unduly magnified. Actually, the obligation of respondent under Section 8 (5) is unaffected by the contract no matter how it be interpreted.

In the first place, as we have pointed out above (pp. 22–26), respondent was obligated to bargain collectively after August 21 on two matters which were completely distinct from the issue as to the construction of the contract. Plainly, the position of employees on one question, whether it be contracts, wages, or anything else, and whether it ultimately be adjudged right or wrong, cannot affect the obligation of the employer to bargain collectively on *other* questions which may entirely resolve the dispute. Hence the proper interpretation of the contract is completely irrelevant to the violation of Section 8 (5) arising from respondent's failure to bargain collectively with respect to its unilateral breach of the agreement for a temporary shut-down on August 21, and with respect to the wage issue.

In the second place, even on the issue as to the proper interpretation of the contract, the merits of the dispute cannot affect the extent of respondent's obligation. Collective bargaining may properly deal with a change in an existing contract. The obligation imposed by Section 8 (5) is obviously not conditioned upon a finding that conditions be left undisturbed. The purpose of the Act is to

encourage the procedure of collective bargaining for the settlement of *all* differences, without regard to either the merits of the respective positions of the disputants or the fact that one party may believe that the issue is already covered by an agreement.

Finally, although the court below appears to have assumed to the contrary (R. 610), no *breach* of the contract had occurred, no matter what its proper construction may have been. A breach could occur only if one of the parties had taken some definitive step. Had respondent hired "new" men for the machine shop, it probably would have breached the contract if its construction were incorrect. Had the employees refused to work, they probably would have breached the contract if their interpretation were erroneous.[9] In fact, therefore, respondent was no more justified in refusing to bargain collectively with the M. E. S. A. committee on the contract issue after August 21 than it would have been had it refused when the controversy first arose several weeks before.

---

[9] The employees did not refuse to work on August 21. The Board found (R. 31–32) that the suggestion that the plant be temporarily closed if the employees would not acquiesce in respondent's interpretation of the contract of June 15 was proposed by Garry Sands—a finding that was amply supported by evidence (R. 375–377, 572). The court below did not disturb this finding (R. 609). There is no evidence that the men refused or threatened to refuse to work unless their view of the contract were accepted by respondent.

2. *The dispute over the proper interpretation of the contract did not abrogate the contract or sever the employer-employee relationship*

The court below also seems to have held that if the employees had breached the contract, respondent could, and did, abrogate the contract, sever the employer-employee relationship, and thereby relieve itself of any further obligation to bargain with the M. E. S. A. committee (R. 610). We have already pointed out (pp. 29–30, 32, *supra*) that the premise upon which the court proceeded was erroneous, since there had in fact been no breach of the contract by the employees. But we need not rely on that, nor need we discuss whether an employer may discharge employees who disagree with him on the interpretation of a collective bargaining contract. In the present case it is clear that respondent did not discharge the M. E. S. A. men at a time when before it was under no obligation to resume negotiations with them.

The first question, of course, is *when* the obligation to bargain arose. The court below seems to have assumed that no obligation existed until the plant reopened on September 3 and Potter, on September 4, called Garry Sands and requested a conference on behalf of the M. E. S. A. committee.[10] Even on that assumption, the court was clearly in

[10] The Board found, on conflicting evidence, that on the day after the plant reopened on September 3 Potter called Garry Sands on the telephone and asked for a meeting (R. 33–34). Potter testified that he requested a conference

error in assuming that the M. E. S. A. men were n longer employees when the request was made. I addition to that fact, however, there was a plai violation of Section 8 (5) on August 26 and 27, at date when there can be no doubt that the M. E S. A. men still retained their employee status.

We have already pointed out, *supra*, pp. 20-21 that the evidence is clear and convincing that whe the plant was closed on August 21 the men wer simply laid off temporarily, subject to being re called to work at any time. Obviously, they con tinued as employees until some change was mad in their status. The record not only contains evi dence which indicates that the men remained simply laid off, rather than discharged, until a least September 4, but also is barren of any evi dence of an attempt by respondent to change thei status before that time.

Several of the M. E. S. A. men continued t work at respondent's request after August 21 Rudd, a foreman and one of the men later dis charged, was called back and worked at the plan on August 26, 27, and 28; several other people wer also working there at that time (R. 222-223) Tulow, another foreman, worked on August 30

(R. 134-135) and Pansky testified that he heard Potte make the request (R. 570). Sands admitted that Potter ha called, but denied that he was asked to meet with anyon (R. 530). The Board was clearly entitled to refuse to credi his denial. The finding was not disturbed by the cour below.

When he was laid off he asked Garry Sands when the plant would reopen, and was told that it was impossible to say (R. 325). Pansky, who also worked on August 30 (R. 353) making a special order (R. 377–378), stated that some men had been working right along (R. 379). Yet none of these men, each of whom spoke to the officers of respondent while they were working at the plant after August 21, were given any intimation that they had been or were to be discharged. Moreover, respondent itself urged, before the Board, that the M. E. S. A. men were not discharged until new men were hired to take their places (R. 94), which would mean that about 10 were discharged when the plant opened on September 3 (R. 450)—still leaving the M. E. S. A. members the great majority of respondent's employees—and the rest from time to time thereafter until the plant was running with a full complement of men sometime in October (R. 535). In addition, the lists of employees posted in the plant were not removed until after September 3 (R. 434). Finally, Rudd worked for respondent even after the plant had opened on September 3, and was specifically discharged by Garry Sands on September 4 (R. 215, 521–522). The inference is plain that he had not been discharged theretofore.

Nor is there any evidence in the record to the contrary. It is a familiar legal principle that in order to effectuate a discharge, the fact of the dis-

charge must be communicated to the employee o
the employer must take such action to the em
ployee's knowledge as is inconsistent with the co
tinuance of the employment relationship, and thi
is so whether the employment is at will or for
term. *Semet-Solway Co.* v. *Wilcox,* 143 Fed. 8
(C. C. A. 3d); *Percival* v. *National Drama Corp*
181 Cal. 631; *Louisville & Nashville R. R. Co.*
Harvey, 15 Ky. L. R. 809; *Jewel Tea Co.* v. *Him*
melstein, 164 Wis. 325. Consequently, even if re
spondent's officers had decided upon a discharg
sometime prior to September 4, it was ineffectiv
for all purposes until communicated to the em
ployees.[11]

Respondent's first attempt to discharge th
men seems to have occurred when Garry Sand
told Potter, in response to the request for
conference, that the M. E. S. A. men had been dis
charged. At that time, however, there was a de
mand for a meeting. Respondent's refusal was
therefore, a violation of Section 8 (5). We submi
therefore, that even on the assumption that th
obligation to bargain first arose on September 4
the M. E. S. A. committee was still the representa
tive of the majority of respondent's employees.

---

[11] Of course, a matter so peculiarly within the knowledg
of respondent's officers should certainly have been testifie
to by them. In the absence of such testimony, it must b
assumed that no intention to effect a discharge actuall
existed.

In any event, it is plain that respondent had violated Section 8 (5) prior to that date. On August 26, Garry and Hilliard Sands, two of respondent's officers, met with representatives of the International Association of Machinists, affiliated with the American Federation of Labor, for the purpose of negotiating a collective labor contract (R. 451–452, 547–548). On the following day the contract was signed by both parties, to become effective on September 3 (R. 452). Plainly, by those acts, respondent had violated Section 8 (5) of the Act.

At the time these negotiations were begun there can be no doubt that the M. E. S. A. men had not been discharged, since nothing had occurred to change their status as laid-off employees. Nor can there be any doubt that the obligation imposed upon an employer by Section 8 (5) of the Act to bargain collectively with the representative of the majority is violated by the action of an employer who bargains collectively with anyone else. In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, this Court reviewed at length its decision in *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, and stated (301 U. S. 44–45):

> We said that the obligation to treat with the true representative was exclusive and hence imposed the negative duty to treat with no other. * * * We think this con-

struction also applies to § 9 (a) of the National Labor Relations Act.

Indeed, a realistic appraisal of the conduct of respondent could leave no doubt that its collective bargaining with the Machinists was tantamount to a plain refusal to bargain with the M. E. S. A. Respondent does not, and could not, deny that fact. The Board has held that an employer violates Section 8 (5) when he bargains collectively with an organization other than the one representing a majority of the employees. *National Motor Bearing Co.*, 5 N. L. R. B. 409; *Zenite Metal Corp.*, 5 N. L. R. B. 509. See also *Virginian Ry. Co. v. System Federation No. 40, supra,* at 548–549; Hearings on Senate Bill No. 1958, 74th Cong., 1st Sess., Pt. 1, p. 43.[12]

Nor is it material that no request was made by the M. E. S. A. committee for a meeting with respondent at that time. No request was possible—the M. E. S. A. committee did not know that respondent was negotiating with another organization. Obviously, a request would have been made had the committee known that respondent was con-

[12] The action of respondent in bargaining with the Machinists is also, of course, a violation of Section 8 (1) of the Act, the provision which forbids any conduct by an employer which operates to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Certainly an employer who bargains with representatives of other than the majority of his employees impairs the rights guaranteed by Section 7, if for no other reason than that his conduct weakens the effective action of the representatives chosen by the majority.

templating not only a departure from the understanding of August 21, but also the discharge of all the M. E. S. A. employees. Indeed, such a request was promptly made when respondent's intention first came to light. Moreover, the policy of Congress, clearly expressed in the Act, is that collective bargaining should be fully and fairly had on issues which might otherwise burden commerce by industrial unrest or strife, in order that, so far as possible, such unrest or strife may be eliminated. That policy is, *pro tanto,* frustrated if an employer may take action which he realizes is likely to result in industrial strife without first meeting with the representatives of his employees in an effort to arrive at an amicable understanding. Particularly is this so when, as here, the employees have representatives with whom the employer is well acquainted, and with whom he has been in frequent consultations in the past. The old National Labor Relations Board set up under Pub. Res. No. 44, 73d Cong., specifically held that an employer is obligated to initiate collective bargaining upon issues about which it knows the employees must desire to negotiate. *Matter of Chicago Defender, Inc.,* 1 N. L. R. B. (old) 119. That decision clearly expresses the intent of Congress under the present Act.

One final factor should be mentioned. If, as we point out in Point II, *infra,* pp. 40–49, the employees were discharged because of their membership in the M. E. S. A. in violation of Section 8 (3)

of the Act—the discharge could not, no matter when attempted, sever the employer-employee status for the purposes of the Act. By the plain terms of Section 2 (3) of the Act, they remained "employees," since their work ceased "because of [an] unfair labor practice."[13] If, therefore, we are correct in Point II, there can be no question under Point I except as to the issues dealt with in Part A, *supra*, pp. 17–28.

We submit, therefore, that respondent has failed to bargain collectively in violation of Section 8 (5) of the Act, and that the decision of the court below to the contrary should be reversed.

II

THE EVIDENCE FULLY SUPPORTS THE BOARD'S FINDING THAT RESPONDENT HAD FAILED TO REINSTATE EMPLOYEES BECAUSE OF THEIR MEMBERSHIP IN THE M. E. S. A. IN VIOLATION OF SECTION 8 (3) OF THE ACT

The Board, upon a full review of the evidence, found as a fact that "the old employees were locked out, discharged, and refused reemployment because they were members of the Mechanics Edu-

[13] The suggestion by the court below (R. 613) that the layoff of August 21 was "equivalent to a strike" does not help respondent. The statement ignores the finding of the Board that the shut-down was suggested by respondent. See footnote 4, p. 19, *supra*. Moreover, even if the statement were true, such a "strike" would not sever the employer-employee relationship. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333.

cational Society of America and had engaged in concerted activity for the purpose of collective bargaining" (R. 38–39). The court below stated: "In this case no evidence appears that the employees were discharged because of their membership in the M. E. S. A. or any union" (R. 613), and refused enforcement to those portions of the Board's order based upon a violation of Section 8 (3). We submit that the finding of the Board is supported by ample affirmative evidence which is further buttressed by the fact that the reasons for the discharge suggested by respondent and the court below are flatly contradicted by admitted facts.

The primary fact in this branch of the case is the complete elimination by respondent of all of its M. E. S. A. employees, a fact which is not denied. When the plant reopened on September 3, 1935, respondent called back to work only those of its former employees who were members of the Machinists union, and recruited its additional help through the Machinists and from the county relief rolls (R. 198–200, 452-453). This peremptory elimination of all of its M. E. S. A. employees, without any notification to them of any kind (R. 169, 186, 206–207, 452–453), plainly shows respondent's intention to rid itself of the M. E. S. A. employees. This fact alone, taken in conjunction with the complete breakdown of all of respondent's attempts to explain it (*infra*, pp. 44–46), leads irre-

sistibly to the conclusion of the Board that M. E. S. A. men were eliminated because of membership in that organization. There is, m over, much more evidence which corroborates conclusion.

The record reveals that respondent had be hostile toward the M. E. S. A. and friendly to the Machinists following the strikes of May June 1935. Hilliard Sands, respondent's sup tendent, admitted that he told Rudd, an M. E. member, that he preferred the Machinists bec they were "a more conservative union" (R. and that they "were more apt to arbitrate with management before they walked out on str (R. 421).

McKiernan, the assistant superintendent, ap ently shared the feeling. He told Norman, M. E. S. A. member who had been discharged was seeking reinstatement (R. 303):

> "* * * Well, Jack," he said, "I will you; there is a lot more of this than you I know of." I said, "How?" just like t He said, "Don't worry, Jack, I will get back. I will get you back when we br this union up"; and I said to him, wouldn't want to come back then." Tha all I said."[14]

The evidence of the hostility of Garry Sands spondent's secretary-treasurer and actively charge of its labor policy, is even clearer. Prio

[14] McKiernan denied the statement (R. 504), but Board believed it to be true (R. 38).

the reopening of the plant Garry Sands called in four of the M. E. S. A. employees and advised them that they were the only ones whom respondent proposed to take back (R. 448–449, 542–544). However, as respects two of the men, Linski and Pansky, the offer was made upon the condition that they drop their affiliation with the M. E. S. A. and join the Machinists (R. 341, 345, 354–356). Sands denied that he so conditioned the offer, but he did admit that he obtained a Machinist's application card for one of the men (R. 489, 493) and that he stressed the provisions of the Machinists' agreement which provided wage increases for its members (R. 527–528). Farrell, a M. E. S. A. member, testified that Sands intimated to him that the M. E. S. A. was trying to "break" him (R. 316). Sands himself related the following conversation with Hudak, another M. E. S. A. member who sought reemployment after the plant reopened (R. 529):

> Oh then, when I told him I couldn't give him a job, he started to plead with me and he said, "Now, Mr. Sands, you know I am an old man, an old friend of yours, and I tried to work for you to help you." I said, "That is fine, Mike." I said, "Didn't I see you out picketing the plant on September 3rd?" He said, "Yes." I said, "Then are you such a friend of mine that you have to picket?" He didn't know what to say. I said, "Well, Mike, you know the M. E. S. A. has filed a

> complaint against us and we don't need any men now. Our plant is all filled up now." I said, "You wait until after the hearing which is going to come up very shortly." And that is the reference to the M. E. S. A. between us.

Indeed, the whole of Garry Sands' testimony is pregnant with lack of understanding of, and hostility to, an employer's obligations under the Act (*E. g.*, R. 515–517, 529, 540–541).

The conclusion of the Board is fortified, rather than weakened, by the various explanations advanced by respondent for the mass lock-out of the M. E. S. A. men. The first explanation, which was apparently accepted by the court below after it had found that "no evidence appeared" (R. 613) in support of the Board's finding, was that the men had breached the contract, and had been discharged for that reason (R. 614). The explanation is directly contrary to the fact that respondent sought to reemploy at least four of the "contract-breakers" (p. 43, *supra*)—some of them members of the M. E. S. A. committee who were probably peculiarly "guilty" of this offense. Under those circumstances it is unlikely that the respondent really did not wish to have alleged "contract-breakers" in its employ. Moreover, it is to be noted that the new agreement with the Machinists contained a seniority provision which is very similar to the position on that question taken by the M. E. S. A. men in their conferences (R. 588). The issues about which the

conferences with the M. E. S. A. had centered apparently were not important in respondent's own estimation—certainly not enough so to warrant a lock-out of every M. E. S. A. member.

The second explanation suggested by respondent is that the M. E. S. A. employees were too highly paid, and that it had to reduce expenses. The suggestion, of course, immediately raises the question discussed in Point I, why respondent never brought up the wage rates as a subject of negotiation. Certainly if this were the true basis for the discharge, there was a plain obligation upon respondent under Section 8 (5) of the Act to discuss a wage rate reduction with the M. E. S. A. men before eliminating them suddenly, and without warning.

Apart from that fact, however, it is apparent that the wage scale of the M. E. S. A. men was not the reason for their mass elimination. Included among the 47 M. E. S. A. members not recalled to work were 25 "new" employees (R. 558–560, 597). Their wages were the same as those of the Machinists who were recalled (R. 373, 375, 590). Assuming, therefore, that respondent could, consistently with its obligations under the Act, replace its employees because their wages were too high without affording them an opportunity to agree to a reduction, the evidence in this case is compelling that membership in the M. E. S. A., and not status as highly-paid employees, was the reason for the lock-out.

Finally, respondent suggests that none of th
M. E. S. A. members applied for reinstatement u
til all of their places were filled (R. 535). Ce
tainly, however, no formal application was nece
sary when the bulletin of August 21, closing th
plant, stated that they would receive "further n
tice" (R. 351), which respondent had always give
before after a temporary lay-off (R. 169, 186, 19
199, 206–207). The men were given every reaso
to believe that they would be notified to return t
their jobs. Moreover, some places were filled b
respondent prior to the date of the reopening (R
452–453), before the M. E. S. A. members knew
their positions were being filled, and before the
had any opportunity to apply for them. In an
event, by respondent's own admission (R. 448
449, 542, 544) it was so clear that respondent woul
not take on any of the M. E. S. A. men that formal
application would have been a vain thing (R. 175
176).

Upon this review of both the affirmative evidenc
and of respondent's proffered explanations, we sub
mit that the court below was plainly wrong in hold
ing that there was "no evidence" to support th
finding of the Board. As this Court has had occa
sion to remark, the court below "though professin
adherence" to the mandate of Section 10 (e) of th
Act that the findings of the Board as to the facts
if supported by evidence, shall be conclusive

"honored it * * * with lip service only." *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 73.

A similar comment is applicable to Point I, *supra*. As was there pointed out, whether respondent had violated its obligations to bargain collectively depends on questions of fact: the character and results of the original dispute and negotiations; the purpose and effect of the agreement for the temporary closing of the plant as a solution of the dispute as it then existed; and the altered character of the dispute after August 21. Judgment upon those facts, as well as upon the ultimate factual question whether, under all the circumstances, the dispute held forth the reasonable likelihood of peaceful settlement which is the basic objective of the statute, was of the very essence of the function of the Board to find the facts (*Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731)—a function the proper exercise of which in the present case was overturned by the Court below in derogation of the plain provisions of the statute.

The importance of this question transcends its application in the case at bar. The problem is general, affecting the whole administration and enforcement of the statute. In many cases the Circuit Courts of Appeals have shown clearly an

observance of the mandate of Section 10 (e) of t
Act, and a purpose to adhere to the line of
marcation drawn by this provision between th
functions and those of the Board. There are, ho
ever, a number of decisions which indicate a co
trary tendency. If that tendency continues, t
Government must either acquiesce in a method
future administration and enforcement of the A
which follows a route contrary to the terms of t
statute, or press upon this court petitions to revi
decisions of the Circuit Court of Appeals in whi
evidentiary questions are controlling or importa
The Government respectfully suggests that t
proper judicial enforcement of the statute depe
upon a clear understanding by the lower courts
the applicable principles here discussed. Cf. *F*
eral Trade Commission v. *Pacific States Pap*
Trade Ass'n, 273 U. S. 52; *Federal Trade Comm*
sion v. *Algoma Lumber Co.*, 291 U. S. 67; *
Vecchio v. *Bowers*, 296 U. S. 280; *Federal Tra*
Commission v. *Standard Education Society*,
U. S. 112; *Swayne & Hoyt, Ltd.* v. *United Stat*
300 U. S. 297. Under those principles the
praisal of evidence in proceedings under the A
and the necessary application of the inferent
process, is a function of the Board as the speci
ized administrative agency familiar with the f
situations and technical problems of the particu
field being regulated, and its judgment as to
facts should be final where not unreasonab
Swayne & Hoyt, Ltd. v. *United States*, *sup*

United States Navigation Co. v. *Cunard S. S. Co.*, 284 U. S. 474, 481–482. Only if those principles are fully accepted can enforcement of the statute be had as Congress intended.

In the earlier years of the operation of the statute it has been necessary and desirable that much litigation should be had to obtain judicial determination of many important questions. The need for that considerable litigation may be expected to diminish. It would be highly undesirable if petitions of an equivalent volume were to be occasioned by the failure of the Circuit Courts of Appeals to give to the findings of the Board the effect which the statute requires.

III

RESPONDENT'S OFFER OF REINSTATEMENT TO CERTAIN OF ITS M. E. S. A. EMPLOYEES UPON CONDITION THAT THEY JOIN THE MACHINISTS WAS IN VIOLATION OF THE ACT

Under Point II (*supra*, p. 43) we have already referred to the offer made by Garry Sands to reinstate two men, Linski and Pansky, both members of the M. E. S. A., upon condition that they join the Machinists. On these facts the Board concluded (R. 32–33, 39, 40–41) that respondent had violated Section 8 (3) of the Act. That section makes it an unfair labor practice for an employer—

> By discrimination in regard *to hire* or tenure of employment or any term or *con-*

> *dition* of employment to *encourage* or *d*
> *courage* membership in any labor organi
> tion: * * * [Italics supplied.]

The court below did not question, as it could r upon the evidence, that "respondent suggested du ing September to two of its old employees that th join the American Federation of Labor [with whi the Machinists was affiliated] as a condition of e ployment" (R. 614). Its conclusion, however, incomprehensible. It stated only that (R. 614):

> Since the contract has already been abr gated and the men had been discharged, a since the M. E. S. A. was no longer the e clusive representative of the employe these acts have no relation to the controver here.

Assuming—contrary to the fact, as we hav pointed out above—everything that the court a sumes: that the contract was abrogated; that th men were no longer employees; and that the M. E S. A. was not the exclusive representative of th employees, it would still be true that in imposin membership in a particular labor organization as condition of employment respondent violated Se tion 8 (3). No closed-shop agreement existed wit the Machinists. The predicates upon which th court below grounded its conclusion would sho only that Linski and Pansky were not employees respondent at the time that respondent require

them to join the Machinists as a prerequisite to their being employed. In that case they would be in the same position as men applying for a position with respondent for the first time. But Section 8 (3) of the Act in express terms makes no distinction between "hire" and "tenure" in its command that an employer refrain from encouraging or discouraging membership in any labor organization. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333; *Jeffery-De Witt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731; *National Labor Relations Board* v. *Carlisle Lumber* Co., 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, No. 907, May 23, 1938.[15] The contrary conclusion by the court below would leave the employer free at the outset to choose for the men the labor organization with which it would deal, contrary to the plain meaning of the Act that the choice is to be that of the men themselves.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that the judgment of the court below

[15] See also *Algonquin Printing Co.*, 1 N. L. R. B. 264, 269-270; *Montgomery Ward & Co.*, 4 N. L. R. B. 1151, 1167-1168; *Kelly-Springfield Tire Co.*, 6 N. L. R. B. 325, consent decree entered, 97 F. (2d) 1007 (C. C. A. 4th).

should be reversed with directions to enforce
order of the Board in full.

ROBERT H. JACKSON,
Solicitor General

CHARLES A. HORSKY,
Special Attorney

CHARLES FAHY,
General Counsel,

ROBERT B. WATTS,
Associate General Counsel,

LAURENCE A. KNAPP,
MORTIMER B. WOLF,
SAMUEL EDES,
Attorneys,
National Labor Relations Board.

NOVEMBER 1938.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Supp. II, Title 29, Sec. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include * * * any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *.

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, * * *.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

SEC. 10.

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1939

FIL

In the S

T

In C